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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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ABEL ACOSTA, CLERK

MICHAEL JOSEPH BIEN

Appellant,

V.

THE STATE OF TEXAS

Appellee.

STATE'S REPLY TO APPELLANT'S BRIEF ON THE MERITS AFTER GRANTING OF DISCRETIONARY REVIEW

Petition for Discretionary Review from:
Eleventh Court of Appeals – Cause Nos. 11-14-00057-CR & 11-14-00058-CR

Appeal from:
35th District Court – Cause Nos. CR22319 & CR22320

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ORAL ARGUMENT NOT GRANTED

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ISSUES PRESENTED

1. Did the court of appeals err in considering parole eligibility when determining the "most serious" offense for purposes of double jeopardy?

2. What is the proper remedy for multiple punishments when the "most serious" offense cannot be determined?

REPLY ISSUES ONE AND TWO

This Court Cannot Change a Remedy Established by the Supreme Court

Appellant asks this Court to reject the *Landers'* rule requiring that an appellate court retain the "most serious" offense after a Double Jeopardy violation has been found. *See Appellant's Brief on the Merits*, pp. 4-12. In it's place, he suggests abandoning both convictions and requiring the State to proceed, from scratch, on only one.

Appellant's request, however, fails to correctly understand the *Landers* decision and its limitations. While the issue in *Landers* was the proper remedy for a double jeopardy violation, that court held that at least part of that determination was answered by the Supreme Court in *Ball v. U.S. See Landers v. State*, 957 S.W.2d 558, 559 (Tex. Crim. App. 1997) (en banc).

The Supreme Court is the entity which held that only one conviction should be vacated after a Double Jeopardy violation has been found. *See Ball v. U.S.*, 470

U.S. 856, 864-65 (1985); *Landers*, 957 S.W.2d at 559. The Supreme Court reaffirmed that holding in *Rutledge v. U.S.*, 517 U.S. 292, 307 (1996).

The *Landers'* decision held that state law governs only the question of which conviction should be vacated. *See Landers*, 957 S.W.2d at 559. Therefore, this Court does not have the authority to change the established remedy for a constitutional violation, especially when that remedy has been established by the Supreme Court. The most this Court can do is reconsider how to determine which conviction to vacate.

Policy Favors Retaining at Least One Conviction

Even assuming that this Court could reject the remedy set out in *Ball, stare decisis* and several other policy arguments provides strong reasons continue retaining one conviction and vacating one conviction.

Stare Decisis

This Court should not frivolously overrule established precedent. *Paulson v. State*, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000). The legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking process, one that differs dramatically from that properly employed by the political branches of government. *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995). If courts did

not adhere to their own decisions, no issue could ever be considered resolved and the potential volume of speculative relitigation under such circumstances alone ought to persuade a court that *stare decisis* is a sound policy. *Id.*

Thus, the doctrine of *stare decisis* promotes judicial efficiency and consistency, encourages reliance on judicial decisions, and contributes to the integrity of the judicial process. *Paulson*, 28 S.W.at 572.

Most importantly, *stare decisis* ensures that the law will not change erratically, but will develop in a principled and intelligible fashion. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). The doctrine of *stare decisis* permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. *Id.* at 265-66. Reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance. *Quill Corp. v. N.D. by and through Heitkamp*, 504 U.S. 298, 320 (1992) (Scalia, J., concurring).

This Court has long recognized the rule set out in *Ball*. *See, e.g., Evans v. State*, 299 S.W.3d 138, 141 (Tex. Crim. App. 2009); *Littrell v. State*, 271 S.W.3d 273, 279 fn.33 (Tex. Crim. App. 2008); *Lopez v. State*, 108 S.W.3d 293, 301 fn.31 (Tex. Crim. App. 2003); *Landers*, 957 S.W.2d at 559. And, despite all of the criticisms appellate courts have raised about how to apply the *Landers* rule, none

of those critics have argued for reversal of both convictions. Nor does any authority support the reversal of both convictions. Such a decision by this Court would be a vast (and unwarranted) departure from current precedent.

Other Public Policies

Additionally, several other very strong public policies weighs heavily against creating such a new rule.

Proliferation of Litigation

As problematic as appellate courts have found the test for determining the "most serious" offense, those problems pale in comparison to those created by reversing all convictions and remanding cases for retrial.

This Court should anticipate extensive litigation of the retroactivity of such a rule, and the numerous cases that were considered completely settled using the *Ball* rule of retaining the most serious offense.

Furthermore, such a rule would encourage defendants to raise Double Jeopardy claims even in marginal cases on the hope of obtaining a windfall result.

Impact on Victims

In the administration of criminal justice, courts may not ignore the concerns of victims, even when enforcing the constitutional rights of an accused. *Morris v. Slappy*, 461 U.S. 1, 14 (1983). Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities. *Id*. Applied to this claim, what victim would willingly testify knowing that, in the event of multiple convictions, both convictions could be set aside and the defendant released pending retrial?

This is especially true in a case such as the case at bar where the victim's entire family is at risk and where the nature of the offense and the risk posed to the victim is so extremely violent.

Based upon his only argument on appeal relating to Double Jeopardy, Appellant does not even argue that he was not appropriately convicted of a first degree criminal offense – either the first degree felony of criminal solicitation or the first degree felony of attempted capital murder. To return the defendant to the position of having no criminal conviction and being able to make a bond and return to society as a free man pending a new trial would place his victims at physical risk. Such a decision would also undermine all confidence that the criminal justice system could ever provide protection for victims and their loved ones.

Besides the physical danger, reversing both convictions to allow for a new trial would have an emotional impact on victims as well. New trials force victims to relive harrowing experiences now long past and does trauma to victims of particularly heinous crimes. *U.S. v. Hasting*, 461 U.S. 499, 507 (1983). Those who participated in an initial trial should not be compelled to confront these dreadful events a second time if the first trial has been fair. *Perry v. Leeke*, 832 F.2d 837, 843 (4th Cir. 1987) *aff'd* 488 U.S. 272 (1989).

Practical Problems of Retrial

In addition to the likelihood of increased amounts of litigation and the negative effect on victims, reversing both convictions for retrial also faces practical problems that could easily result in a windfall for a truly guilty defendant.

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation. *Engle v. Isaac*, 456 U.S. 107, 127 (1982).

Retrying cases multiple years after a conviction was obtained can present practical problems. *Hasting*, 461 U.S. at 507. The passage of time, erosion of memory, and dispersion of witnesses may as a practical matter make a second prosecution difficult. *Perry*, 832 F.2d at 843.

Even if an effective retrial is possible, it imposes enormous costs on prosecutors, who must commit already scarce resources to repeat a trial that has already once taken place. *Id.* Retrials, moreover, may lack the reliability of the initial trial where witnesses' testimony was unrehearsed and witness recollections were more immediate. *Id.*

Policy Considerations Conclusion

American courts have been condemned for ignoring "substantive law and justice" and treating trials as sporting contests in which the inquiry is "have the rules of the game been carried out strictly?" *Morris v. Slappy*, 461 U.S. 1, 15 (1983). However, a criminal trial is not a "game." *Id.* Appellant's argument that both convictions should be vacated is one of the most palpable and unmistakeable examples of gamesmanship that is possible within the realm of criminal justice.

Appellant asks this Court to reverse a conviction that is legitimate and rightfully entered against him simply because he believes a second conviction was wrongfully entered against him. While the societal interests of retrial and reversal are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue or innocence, the balance of interest tips decidedly the other way when an error has no effect on the outcome of the trial. *U.S. v. Mechanik*, 475 U.S. 66, 72 (1986).

The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources. *Morris*, 461 U.S. at 15.

While vacating both convictions may, in theory, entitle the defendant only to retrial, in practice because of all of the above concerns, it might also reward the accused with complete freedom from prosecution. *Engle v. Isaac*, 456 U.S. 107, 127 (1982). Therefore, strong policies support the retention of at least one conviction.

Appellate Courts Are Capable of Determining the "Most Serious" Offense

Appellant's claim that appellate courts are not capable of determining the "most serious" offense without becoming slogged down in parole considerations misrepresents the type of parole considerations being advocated by the State.[1]

Appellant claims that reviewing judges should not be allowed to "indulge in the very considerations deemed speculative by the Legislature and forbidden to juries." *Appellant's Brief on the Merits*, p. 6. However, this drastically distorts the Eleventh Court of Appeals' decision and what other courts have done.

[1] Assuming that this Court rejects the State's argument that an appellate court should remand to the trial court to allow a prosecutor to designate the "most serious" offense, which the State advocated in its brief on the merits.

The basis for Appellant's misrepresentation or misinterpretation is that Appellant incorrectly equates a consideration of when a defendant will become parole eligible with when a defendant will receive parole. *See Appellant's Brief on the Merits*, pp. 4-5.

Juries are allowed to consider *the existence of the parole law and good conduct time* when assessing punishment but are not allowed to consider *when a defendant will be released on parole*. *See* Tex. Code Crim. Proc. Art. 37.07 Sec. 4(a) (West, Westlaw through Sess. 2015). Juries are instructed:

> You *may consider the existence of the parole law and good conduct time*. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant. Tex. Code Crim. Proc. Art. 37.07 Sec. 4(a) (West, Westlaw through Sess. 2015) (emphasis added).

The State's position is simply that an appellate court should be allowed to consider the exact same thing a jury does when assessing punishment – the existence of the parole law and good conduct time. The State is not advocating that an appellate court attempt to predict whether a particular defendant will be awarded or will forfeit good conduct time or when a defendant will be released on parole.

Other cases demonstrate how the State's interpretation of how an offense's 3(g) status may be considered without entering the "thicket of parole eligibility and

awards of good conduct time" that Appellant references. *See Appellant's Brief on the Merits*, p. 5; *Villaneuva v. State*, 227 S.W.3d 744, 749 (Tex. Crim. App. 2007); *Williams v. State*, 240 S.W.3d 293, 301-02 (Tex. App.—Austin 2007, pet. ref'd).

Particularly, in this case, the Eleventh Court of Appeals did not enter into any discussion of when Appellant would be awarded parole. *See Bien v. State*, --- S.W.3d ---, 2016 WL 859378, at *4 (Tex. App.—Eastland March 3, 2016, pet. granted). The Court simply held that criminal solicitation's status as a 3(g) offense limits a trial court's ability to suspend a defendant's sentence and affects parole eligibility and therefore held that criminal solicitation is therefore the "most serious" offense. *Id.*

Appellant also states that "[w]hile two people serving 30-year aggravated sentences become parole eligible in 15 years, one can be promptly paroled while the other is never paroled." *Appellant's Brief on the Merits*, p. 5.

While this statement is true in isolation, trying to compare when two different defendants are granted parole to when one defendant becomes parole eligible on two different cases is comparing apples to oranges and so is irrelevant to this issue.

Therefore, appellate courts can consider the 3(g) implications of offenses when determining the "most serious" offense without becoming bogged down in speculation about when parole would be awarded to a specific defendant.

Additionally, while determining the "most serious" offense is far less difficult than the actual double jeopardy analysis itself may be, and can easily be simplified by a decision from this Court that either remands the cases to the trial court for a prosecutor to designate the "most serious" offense or that clearly allows consideration of an offense's status as a 3(g) offense in determining the "most serious" offense.[2]

The "Most Serious" Offense Test Protects All Interests the Best

Appellant claims that the *Landers'* rule encourages the State to commit Double Jeopardy violations. *See Appellant's Brief on the Merits*, p. 9. However, this argument is based upon the flawed premise that the State has nothing to lose but the conviction of the least importance to it. *See Appellant's Brief on the Merits*, p. 9.

On the contrary, the State still has to expend extensive resources litigating on appeal whether an offense constitutes Double Jeopardy. At a minimum, prosecutors have an incentive to avoid lengthy and time-consuming appellate litigation over whether an offense does violate Double Jeopardy.

This argument also ignores the political cost to the State of having convictions overturned. As each prosecutor's office is headed by an elected

[2] The benefits of both of these options are contained within the State's Brief on the Merits.

official, having any conviction reversed – whether or not another conviction on the same defendant is upheld – still poses political costs within the community. Such political costs also provide deterrence against an intentional violation of Double Jeopardy.

Appellant argues that "[p]rosecutors are fully capable of knowing when they are seeking multiple punishments for the same offense." *Appellant's Brief on the Merits*, p. 9. Appellant assumes that Double Jeopardy analysis are always straightforward and that the outcome is always predictable. However, the fact that discretionary review has been granted in this particular case to determine whether the offenses did in fact violate double jeopardy belies that argument.

Double jeopardy analysis can be extremely complex and turns on a variety of factors such as how many statutes are involved, how many trials and indictments are involved, and the order of those trials and indictments. Additionally, in a multiple punishment Double Jeopardy claim, the analysis may turn upon a determination of legislative intent and/or the gravamen of an offense. To claim that prosecutors are always capable of knowing when two charges would violate Double Jeopardy in those circumstances would require the State to anticipate future appellate rulings on legislative intent and the gravamen of an offense.

Going beyond alleged prosecutorial indifference to constitutional violations, Appellant asks this Court to create a new remedy for Double Jeopardy violations when "the prosecution *knowingly* sought multiple convictions for the same offense." *Appellant's Brief on the Merits*, pp. 11-12.

Such a new remedy is unworkable, unnecessary, and fails to protect any public interests.

First, such a remedy is unworkable. Attempting to discern whether a prosecutor knowingly sought multiple convictions for the same offense is impossible. Nothing in the record will provide evidence from which an appellate court can reliably know a prosecutor's intent as it relates to Double Jeopardy.

As illustrated above and through the State's Brief on the Merits in this case, it can hardly be said that a prosecutor's office could actually know with any certainty whether two convictions would violate Double Jeopardy. Appellate courts would then have assess how strong the arguments are for and against a double jeopardy violation *and* whether the specific prosecutors involved in this case were aware of all of the case law and arguments that would inform this decision. As almost all legal decisions on the trial court level are made based upon predictions about likelihood of appellate decisions, an appellate court is then left to engage in nothing but pure speculation about what the prosecutor knew.

Furthermore, this argument makes little sense. It is reasonable to assume that prosecutors do not generally intend to seek convictions that are going to be overturned on appellate review. Such actions would waste finite resources of a prosecutor's office. Rarely would there be any incentive at all to pursue a conviction that a prosecutor *knows* will be overturned.

PRAYER FOR RELIEF

Therefore, the State respectfully requests that this Court first analyze whether a Double Jeopardy violation occurred based upon the issue presented by the State in its Brief on the Merits. Should this Court find a Double Jeopardy violation, then the State asks this Court to consider both the arguments presented in its Brief on the Merits as well as this Reply Brief in determining the proper remedy for this violation.

The State asks that if this Court does hold that a Double Jeopardy violation did occur, that this Court affirm the Criminal Solicitation offense as the most serious offense and vacate the conviction for Attempted Capital Murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was mailed by U.S. Mail to Keith S. Hampton, Attorney at Law and Cynthia L. Hampton, Attorney at Law, 1103 Nueces Street, Austin, Texas 78701, on the 30th day of November, 2016.

/s/ELISHA BIRD
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The undersigned certifies that a true and correct copy of the foregoing brief was mailed by U.S. Mail to Lisa McMinn, State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, on the 30th day of November, 2016.

/s/ELISHA BIRD
Elisha Bird
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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 3,699 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

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